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No. 89-501

In the Supreme Court of the United States

OCTOBER TERM, 1989

NORTHWESTERN INDIANA TELEPHONE CO., INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT L. PETTIT
General Counsel
Federal Communications Commission
Washington, D.C. 20554

12 pp

QUESTION PRESENTED

Whether the court of appeals properly declined to entertain statutory and First Amendment challenges to the Federal Communications Commission's telephone/cable cross-ownership rule because those arguments had not been raised in the initial proceeding before the Commission and the Commission had refused to entertain those arguments on a remand to consider different issues.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-13a, is reported at 872 F.2d 465. The report and order of the Federal Communications Commission, Pet. App. 18a-31a, is reported at 3 F.C.C. Rcd 3096.

JURISDICTION

The judgmen of the court of appeals, Pet. App. 16a-17a, was entered on April 11, 1989. A petition for rehearing with a suggestion of rehearing en banc was denied on June 27, 1989. Pet. App. 14a-15a. The petition for a writ of certiorari was filed on September 25, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since 1970 the Federal Communications Commission's telephone/cable cross-ownership rule has prohibited a telephone company from affiliating with a cable television company in its telephone service area in any manner, except through a "carrier-user relationship." 47 C.F.R. 63.54 and note 1(a). In March 1985, the Commission determined that petitioners Northwestern Indiana Telephone Co., Inc. (NITCO) and Northwest Indiana CATV, Inc. (Northwest CATV) were in violation of that rule, and ordered divestiture of the cable television facilities in three communities within NITCO's service area. Pet. App. 103a-127a.

2. On a petition for review, the Court of Appeals for the District of Columbia Circuit remanded for clarification of the Commission's order as it related to the definition of a prohibited affiliation under its rule and the scope of the "carrier/user" exception. Pet. App. 32a-43a. At the same time, the court declined to entertain petitioners' arguments that the Commission's definition of a prohibited affiliation exceeded that contained in Section 613(b) of the Cable Communications Policy Act of 1984, 47 U.S.C. 533(b) (Supp. V 1987), and that the Commission's definition violated the First Amendment. The court reasoned that petitioners' statutory and constitutional arguments – raised for the first time in a supplemental brief submitted one week before oral argument in the court of appeals – were not properly presented on judicial review because they had not first been presented to the Commission. Pet. App. 42a n.8.

3. On remand, the Commission responded to the court's request for clarification and reaffirmed its order as clarified. Pet. App. 18a-31a. The Commission rejected petitioners' attempt to expand the "limited" scope of the remand proceeding to adjudicate petitioners' statutory and constitu-

tional challenges to the Commission's cross-ownership rule. The Commission found that petitioners' "attempt to inject new arguments at this late date * * * would not be in the public interest." Pet. App. 31a n.40.

4. The court of appeals denied the petition for review. Pet. App. 1a-13a. It held that the Commission had "responded adequately," Pet. App. 2a, to the court's earlier concerns and had provided a "reasonable interpretation of the cross-ownership regulations and the Commission's prior precedents." Pet. App. 12a. The court again declined to entertain petitioners' statutory and constitutional arguments. The court declined, under the "doctrine of law of the case," to revisit its earlier determination that petitioners' arguments were not properly presented in the initial appeal. Pet. App. 12a. The court further held that petitioners had waived their right to present in a second appeal arguments that could have been considered in the initial appeal but for petitioners' failure to present those arguments to the Commission. Pet. App. 9a-10a. The court also concluded that exhaustion principles, codified in Section 405 of the Communications Act, 47 U.S.C. 405, made it inappropriate for the court to entertain arguments that could have been but were not presented in the initial proceeding before the Commission. In response to petitioners' contention that they had presented their arguments to the Commission on remand, the court held that the "values served by exhaustion principles would be seriously compromised if agencies were obliged," because of the fortuity of a judicial remand on other matters, to furnish litigants a second opportunity to satisfy exhaustion requirements. Pet. App. 11a.

On July 1, 1989, petitioner Northwest CATV sold the cable systems which were the subject of the Commission's divestiture order. Pet. 5 n.6; Pet. App. 149a.[1]

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[1] As a result of other litigation, petitioner NITCO is no longer threatened with the $20,000 forfeiture originally ordered by the Com-

ARGUMENT

Petitioners renew their contentions, uniformly rejected by the court of appeals and the Commission as not properly presented, that application of the Commission's cross-ownership rule in this case violates Section 613(b) of the Cable Communications Policy Act of 1984, 47 U.S.C. 533(b) (Supp. V 1987), and the First Amendment.

1. Petitioners waived their statutory and constitutional challenges and failed to exhaust available administrative remedies when they failed to assert those claims in the initial proceeding before the Commission. As the court of appeals pointedly observed, petitioners' "Cable Act argument represent[s] a particularly poor candidate for first-time consideration on appeal because petitioners had actually argued before the Commission that the Cable Act did not apply to their case." Pet. App. 12a. And, as petitioners themselves concede regarding their constitutional claim, it was "well established that the cable television business, just like the newspaper or broadcast television business, is a form of speech protected by the First Amendment." Pet. 3 n.3 (citing, inter alia, *Midwest Video Corp.* v. *FCC*, 571 F.2d 1025, 1053-1057 (8th Cir. 1978), aff'd, 440 U.S. 689 (1979)). Because petitioners could have briefed and argued their statutory and constitutional claims in the initial proceeding before the Commission in 1985, their failure to do so means that those claims were waived for purposes of this case.

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mission. Pet. 13 n.18. Hence, no direct monetary consequences flow from the Commission's order in this case.

Subsequent to its order in this case, the Commission published a further notice of inquiry and notice of proposed rulemaking in which the Commission proposed to consider relaxation of its telephone company-cable television cross-ownership rule. 3 F.C.C. Rcd 5849 (1988). The Commission's notice states that the proposed relaxation is responsive to policy considerations rather than to the First Amendment or the Cable Communications Policy Act. *Id.* at 5864-5866.

Petitioners attempt to explain their procedural default (at least as it relates to their First Amendment claim) by asserting that they could not have foreseen the possibility of a constitutional challenge prior to this Court's decision in *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986). Pet. 21-23. *Preferred*, however, held only that the activities of a cable television system "plainly implicate First Amendment interests," 476 U.S. at 494, a proposition that had been earlier suggested by this Court in *FCC* v. *Midwest Video Corp.*, 440 U.S. at 709 n.19, and had been "well established" in the courts of appeals, as petitioners themselves argue. Pet. 3 n.3. Thus, this Court's decision in *Preferred* cannot excuse petitioners' default.[2]

Because this Court's decision in *Preferred* worked no radical change in First Amendment law, petitioners err in

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[2] Petitioners attempt to distinguish the case law existing before *Preferred* by stating that it focused on the rights of operating cable companies rather than potential cable operators. Pet. 22 n.32. It is a familiar axiom, however, that the First Amendment protects both speakers who are already speaking or have spoken (from unconstitutional sanctions) as well as speakers who would like to speak but are forbidden (by unconstitutional prior restraints). Cf. *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (per curiam). Petitioners' First Amendment claim was thus clearly available at the time of the initial Commission proceeding.

Petitioners' contention that "there was a 'lack of direct precedent' " as late as "April 1985" is both immaterial and inaccurate. Pet. 22 n.32. The case petitioners' cite for this proposition, *Tele-Communications of Key West, Inc.* v. *United States*, 757 F.2d 1330, 1336-1337 (D.C. Cir. 1985), was decided after and relied on the Ninth Circuit's decision in *Preferred Communications, Inc.* v. *City of Los Angeles*, 754 F.2d 1396, 1404 (1985), whose judgment was subsequently affirmed "on a narrower ground" by this Court. 476 U.S. at 493. In effect, petitioners insist that they should not be held to have been able to foresee their First Amendment claim unless there was a controlling decision by this Court on a claim closely analogous to their own. Petitioners cite no authority for restricting waiver to such extremely unusual circumstances.

relying on *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), as authority to revive their constitutional claim. Pet. 21-23. The Court in *Butts* held that the defendant in that libel action could raise on appeal constitutional defenses that it had not asserted at trial, which was completed before this Court decided *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). The holding in *New York Times* that some applications of libel law might violate the First Amendment was, unlike *Preferred*, a departure, according to the Court in *Butts*, from "strong precedent indicating that civil libel actions were immune from general constitutional scrutiny." 388 U.S. at 143-144 (plurality opinion); *id.* at 172 n.1 (opinion of Brennan, J.).

2. Because petitioners failed to present their statutory and constitutional claims in a timely fashion in the Commission's initial proceeding, the Commission acted well within its authority in declining to entertain them in a remand proceeding ordered by the court of appeals for purposes of clarifying the Commission's order on unrelated grounds. If the court of appeals had affirmed the Commission outright, petitioners' statutory and constitutional claims undoubtedly would have been procedurally barred. The "fortuity" that the court instead had ordered a remand for clarification of unrelated issues did not give petitioners a right to a "second bite[ ] at the apple." Pet. App. 11a. The proceeding on remand thus did not serve to rescind petitioners' waiver; nor did petitioners' belated attempt to inject new issues in the remand proceeding satisfy the exhaustion requirement embodied in Section 405 of the Communications Act, 47 U.S.C. 405.[3]

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[3] The court below observed that exhaustion requirements do not generally apply to facial constitutional arguments. Pet. App. 10a n.3 (citing *Weinberger* v. *Salfi*, 422 U.S. 749 (1975)). Unlike petitioners' case, *Salfi* involved the constitutionality of a statute. See 422 U.S. at 764.

3. Petitioners' challenge to the Commission's authority to require them to obtain a certificate under Section 214 of the Communications Act, 47 U.S.C. 214, is without merit. The Commission expressly declined to reach the issue whether a Section 214 certificate would have been required if petitioners had not been found to be affiliated under Section 63.54 of the rules, 47 C.F.R. 63.54. Pet. App. 30a-31a.[4] Petitioners themselves recognized at various stages of this proceeding that a Section 214 certificate would have been necessary if, contrary to their contention, they were properly found to be affiliated. Pet. App. 30a & n.37, 42a-43a. That eventuality has now come to pass: The Commission has held that petitioners were affiliated within the meaning of Section 63.54 of the rules and petitioners have not requested this Court to review that holding. Pet. App. 6a-9a. There is therefore no basis for reviewing the Commission's application of Section 214 in this case.

The court below properly found that exhaustion requirements were applicable here because petitioners' constitutional challenge was directed to an agency rule. Pet. App. 42a n.8

[4] In *General Telephone Co. of California* v. *FCC*, 413 F.2d 390, 401-402 n.19 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969), the court upheld the Commission's authority to require a telephone company to obtain a Section 214 certificate to provide a channel distribution service to a cable television system, even though the particular telephone company was exempt, pursuant to Section 2(b)(2) of the Communications Act, 47 U.S.C. 152(b)(2) (1982 & Supp. V 1987), from Section 214's certification requirements for most other purposes.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**

ROBERT L. PETTIT
General Counsel
Federal Communications Commission

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* The Solicitor General is disqualified in this case.

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